

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

RULES FOR MARKET TESTS OF  
EXPERIMENTAL PRODUCTS

Docket No. RM2013-5

**REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE**  
(October 10, 2013)

The United States Postal Service hereby submits its reply to the Public Representative's Comments Concerning Notice and Order of Proposed Rulemaking filed on September 19, 2013 in response to the proposed rules for Postal Regulatory Commission review of market tests of experimental products under 39 U.S.C. § 3641.<sup>1</sup>

As discussed below, the Postal Service has reservations regarding some of the Public Representative's suggested revisions to the proposed rules. For purposes of communicating those reservations, the discussion below will refer to the Public Representative's Comments and contrast certain of its *suggestions* with the Commission's rulemaking *proposals*.

***I.* Geographic Markets**

At pages 4-5 of its Initial Comments, the Public Representative urges the Commission to establish a definition of "geographic market" for purposes of exercising its authority under subsection 3641(e)(1) to prevent market disruptions within the meaning of subsection 3641(b)(2) and proposed Rules 3035.3(b)(3), 3035.17 and

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<sup>1</sup> Docket No. RM2013-5, Order No. 1803, Notice and Order of Proposed Rulemaking Establishing Rules for Market Tests of Experimental Products (August 9, 2013).

3035.20(c). The Public Representative points to various definitions of “geographic markets” employed by other Federal regulatory agencies or courts empowered to review agency action.

The Postal Service cautions the Commission to tread carefully in determining whether a prophylactic rule can be fashioned to define the geographic market relevant to each and every market test. Such factors as the types and numbers and proximity of available channels through which postal customers can access an experimental product are relevant. Is the product change accessible via a significant number of the approximately 30,000 postal retail and/or delivery units, several hundred mail processing plants, or a single universally accessible internet portal? Assume the existence of a hypothetical experimental postal product in the form of bulk mailings generated by a particular type of commercial enterprise (bank, merchant, service provider). To what degree is the relevant geographic market defined by the proximity of potential mail senders/producers to one another? To what degree is it defined by whether experimental mail product recipients are clustered in proximity to one another or dispersed throughout the postal system? If the postal product is offered by the Postal Service in some manner jointly with one or more third-parties, what is the relevance of the physical proximity of the third-parties to one another in defining the relevant geographical market? It is the Postal Service’s preference that the Commission conduct market test review with the flexibility necessary to address factors and circumstances that have yet to be confronted and that the Commission not establish rules defining relevant geographic markets based solely on the limited range of its experience to-date under section 3641.

## **//. Rule 3035.3 -- Contents Of Notice**

### **A. Proposed Rule 3035.3(a)(2)**

In its Comments, at page 1 of its Appendix A, the Public Representative suggests that the words “or continued offering” be stricken from proposed Rule 3035.3(a)(2). The Postal Service advises that these three words be preserved in the proposed rule, as they assist in implementing proposed Rule 11, which addresses Commission review of Postal Service requests for continuation of market tests beyond their original expiration dates.

Proposed Rule 3035.11(c) would implement the Commission’s authority to review a Postal Service request that a market test be extended. As proposed, this rule would require a Commission finding that the requested extension is consistent with the requirements of section 3641, and would allow the Postal Service to extend the test if any deficiencies identified in response to its extension request are cured. The Postal Service assumes that the words stricken by the Public Representative from proposed Rule 3035.3(a)(2) are included by the Commission for the purpose of making clear that the general requirements for market tests also apply when such tests are extended beyond their originally scheduled duration. Accordingly, inclusion of the words “or continued offering” in Rule 3035.3(a)(2) seems appropriate.

### **B. Proposed Rule 3035.3(a)(2)(i)-(iii)**

The Public Representative suggests the addition of subparagraphs to proposed Rule 3035.3(a)(2). The Postal Service finds the suggestions objectionable to the extent stated below.

**1. Subparagraph (a)(2)(i)**

Paragraph (a)(2) would require that each Postal Service notice of a proposed market test establish that the “*experimental product* will not create an unfair or otherwise inappropriate competitive advantage for the Postal Service or any mailer, particularly in regard to small business concerns”. (Emphasis added.) The Public Representative appears to suggest the adoption of subparagraph 3035.3(a)(2)(i) to impose an additional threshold requirement that the Postal Service notice also analyze whether the *market test* itself – separate and apart from the experimental product -- creates such an unfair advantage to small business concerns. In support of its suggestion, the Public Representative alludes to what “Congress may have had in mind,” but fails to provide any support for its assertion of possible Congressional intent. See Public Representative Comments at 7-8. Alternatively, if *market test* in the Public Representative’s suggested subparagraph (a)(2)(i) is synonymous with *experimental product*, then suggested subparagraph (a)(2)(i) seems redundant in light of the Commission’s proposed subparagraph (a)(2). In either case, the Commission should decline to adopt the Public Representative’s suggested subparagraph (a)(2)(i).

**2. Subparagraphs (a)(2)(ii) and (iii)**

In suggesting subparagraphs (ii) and (iii) of proposed Rule 3035.3(a)(2), the Public Representative seeks to transform the process of consideration of the impact of an experimental product on *competition*, particularly in regard to small business concerns as a whole, into something not intended by Congress. The Public Representative seeks to impose a requirement via suggested subparagraph (ii) that each Postal Service market test notice identify individual small businesses that “will

likely be affected” by a specific experimental product. In its subparagraph (iii), the Public Representative would require the Postal Service market test notice to then analyze the potential impact of the experimental product on “any small business concern” identified in response to its subparagraph (ii).

These suggestions appear to be based upon a misreading of the intent of section 3641(b)(2). Consistent with the statutory scheme as a whole, the intent of the section is to require consideration of the potential impact of the offering of an experimental postal product on small businesses<sup>2</sup> *generally*, not on individual small business entities individually. The Public Representative’s apparent misinterpretation of section 3641(b)(2) is contrary to the longstanding approach to postal product pricing -- now reflected in statutory section 3622(c)(3)<sup>3</sup> -- which requires consideration of the effect of proposed postal rate increases upon business mail users *generally* and on competition for the private delivery of mailable non-letter matter *generally*. See *Direct Marketing Association v. U.S. Postal Service*, 778 F.2d 96, 106 (2d Cir. 1985). The Public Representative’s suggested interpretation of section 3441(b)(2) also flies in the face of the section 3622(c)(10)(B) directive that, in establishing special classifications, consideration be given to whether such classifications would cause unreasonable harm to the marketplace *generally*, as opposed to individual competitors. In its review of a Negotiated Service Agreement, the Commission recently noted that it had:

assessed the potential effects of this NSA on competition as a whole, rather than the impact on individual competitors.

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<sup>2</sup> As defined by the U.S. Small Business Administration and the U.S. Office of Management and Budget’s North American Industry Classification System.

<sup>3</sup> Formerly 39 U.S.C. § 3622(b)(4).

Docket No. R2012-8, Order No. 1448, Order Approving Additional of Vlassis Direct Mail, Inc. NSA to the Market Dominant Product List,6 (August 23, 2012) at 26.

Moreover, the Public Representative's approach to consideration of the impact of experimental postal products on small business concerns would require the Postal Service to possess information it does not have and cannot readily acquire. The Postal Service has no registry of small business entities. Nor does the Postal Service have authority to access the internal operational and financial records of such entities for the purpose of assessing the potential impact of an experimental postal product on each entity separately. Thus, the Public Representative's suggestions to expand the Commission's regulatory authority through suggested subparagraphs (a)(2(ii) and (iii) are contrary to law and impractical.

### **III. Data Collection Methods And Reporting**

#### **A. Rule 3035.3(b)(6)**

The Postal Service objects to the Public Representative's suggestion that proposed Rule 3035.3(b)(6) be expanded to *require* the data collection plan submitted in support of a market test notice to also describe "the process by which the data will be collected." The Postal Service should be permitted a measure of flexibility in this area. The critical aspects of a data collection are the data to be collected and the obligation to periodically report those data. As it approaches a market test, the Postal Service can be expected to have identified the method(s) by which it intends to collect data. However, the question of methodology could be in flux at the time of filing of its market test notice, subject to resolution shortly thereafter. Later, during the test itself, the

Postal Service may find that method significantly more costly than originally anticipated, or no longer available or feasible. It may discover a superior or more cost-effective approach to meeting its data collection and reporting obligations mid-stream. To the extent that a determination has been made before it files a market test notice, the Postal Service is not averse to identifying the method(s) by which it intends to collect data. However, it seems that the focus of review should be on the nature of the data to be collected and reported, without inviting the possibility of internecine disputes between intervening parties and Postal Service regarding data collection techniques and administration.

**B. Rule 3035.6**

The Postal Service's objection to the Public Representative's version of proposed Rule 3035.3(b)(6) is exacerbated by the Public Representative's suggestion at pages 8-9 (and Appendix A, page 4) of its Comments that proposed Rule 3035.6 also require that all non-emergency changes in a market test of any kind, whether "material" or "immaterial," be reported to the Commission at least 15 days before implementation. It is not clear whether the Public Representative would regard a change in data collection methods as "material." However, the Public Representative would have the Postal Service report and the Commission adjudicate every conceivable change in the conduct or administration of a market test, irrespective of materiality. If implemented, the Public Representative's suggested amendments to proposed Rule 3035.6 threaten to clog Commission dockets with reports and adjudications about postal market test administrative minutiae with little, if any, nexus to the merits of an experimental product concept. In addition, such proceedings would be further complicated by disputes

regarding whether a change in question was “any” ordinary change within the meaning of the Public Representative’s suggested Rule 3035.6(a) or an “emergency” change within the meaning of the Public Representative’s suggested Rule 3035.6(d).

The Postal Service considers that a more reasonable approach to data collection and reporting is reflected in the Commission’s proposed Rules 3035.3(b), and that a more reasonable approach to reporting market test changes is reflected in the Commission’s proposed Rule 3035.6.

#### **IV. Rule 3035.11(b) – Extension Of Test**

At page 9 of its Comments, the Public Representative discusses its suggestion that the Commission’s proposed rule governing requests for a market test extension be expanded to include a three-part Rule 3035.11(b)(1) list of detailed information to be provided in support of such requests. This suggestion seems redundant of the Commission’s proposed Requirement in Rule 3035.11(b)(1) that the Postal Service “[e]xplain why an extension is necessary to determine the feasibility or desirability of the experimental product.” Secondly, the Public Representative’s suggested subparagraphs (b)(1)(ii) and (iii) appear to demand proof that an extension *will* provide needed data, and that changes to the data collection plan *will* facilitate collection of needed data. It seems unreasonable to expect the Postal Service to do more than assert what *is expected* to occur. The Public Representative also suggests a change to Rule 3035.11(b) that it neither references nor explains at page 9 of its Comments. At page 5 of its Appendix A, the Public Representative suggests, without explanation, that the periodic reporting of revenue referenced in subparagraphs (3) and (4) of Rule



3035.11(b) be performed on a quarterly basis instead of the annual basis proposed by the Commission. In the absence of any indication by the Commission that annual revenue data do not satisfy its needs, the Postal Service should not be burdened with more frequent reporting merely at the whim of the Public Representative.<sup>4</sup>

And the Public Representative suggests another unexplained change to subparagraph (b)(4) of Rule 3035.11. As proposed by the Commission, subparagraph (b)(4) appears to recognize that expert projections of additional revenue expected from a market test extension can be judgmental and qualitative in nature. Accordingly, the rule proposed by the Commission would require the Postal Service to provide any *available* documentation supporting any such projections. However, the Public Representative (Comments at Appendix A, page 5) suggests that the word *available* be stricken from proposed subparagraph (4). The result could, in some circumstances, require that a judgmental estimate that is best or perfectly explained in narrative form be, instead, provided in the form of a table or spreadsheet to satisfy the Public Representative's mandatory documentation requirement. Accordingly, the Commission's more flexible proposal in Rule 3035.11(b)(4), which does not elevate form over substance, is preferable.

## **V. Rule 3035.12(b) – Cancellation Of Test**

The Public Representative's suggested revision of proposed Rule 3035.12(b) (Comments at 9-10, Appendix A at 6) adds nothing to the more concise version

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<sup>4</sup> This same concern applies to the Public Representative's suggestion that Rule 3035.16(f)(2) and (3) require calculations of quarterly (instead of annual) revenue, and its suggestion that Rule 3035.20(a)(4) require reporting of quarterly volumes, whereas the Commission's proposed rules do not seek data on a quarterly basis.

proposed by the Commission. The rule need not codify each and every conceivable procedural step in the Commission's reasonable exercise of its authority under statutory section 3641(f). In the interest of avoiding a set of rules cluttered with redundancy, the Postal Service favors adoption of the Commission's proposal.

## **VI. Rule 3035.17 -- Market Disruption**

At page 3 of its Comments, the Public Representative suggests that proposed Rule 3035.17 be expanded upon to present a clearer definition of the term "market disruption" in 39 U.S.C. § 3641(b)(2) than appears in the body of that statutory provision. At page 4 of its Comments, the Public Representative alludes to the Commission's 39 U.S.C. § 3662 authority to review rate and service complaints that allege enactment of postal rules or regulations which create an "unfair competitive advantage" within the meaning of statutory section 404a. Then, the Public Representative suggests that the Commission use the results of the analysis underlying its effort in Docket No. RM2013-4 to define "unfair competitive advantage" in section 404a(a)(1) as a basis for developing a definition of "unfair or otherwise inappropriate competitive advantage" for purposes of section 3641(b)(2).

However, the Public Representative offers no guidance, and it is not clear whether the principles emerging from the examination of "unfair competitive advantage" as it relates to permanent product transfers in Docket No. RM2013-4 will be suitable to an assessment of the potential impact of the temporary introduction of an experimental product subject to the dollar limitation of subsection 3641(e). While a detailed and technically precise set of "market disruption" rules would add clarity, the specificity

implicit in such a set of rules may be difficult to achieve in the abstract, given the narrow purpose of the statutory market test policy guidelines and the fact-dependent nature of each section 3641(b)(2) judgment the Commission may be called upon to make. In the absence of such precision, the Postal Service encourages the Commission to proceed, as its proposed rules apparently intend, by viewing each market test in light of the intent of section 3641(b)(2) on a case-by-case basis without pre-determined constraints that could stifle the investigation of potential product concepts and product innovation that section 3641 seeks to foster. Sections 3622, 3632 and 3642 impose strenuous tests for the establishment and review of any permanent postal products or changes that may emerge from section 3641 market testing. To the extent that it incorporates section 404a, section 3662 guides the Commission's limited review of the competitive impacts of postal rules and regulations. It is important that these more strenuous requirements unrelated to limited product experimentation not be imposed prematurely and not seep into the Commission's section 3641 review of the Postal Service's investigation of product concepts through market tests.

## **VII. Rule 3035.18 – Filing For Permanent Product Status**

The Commission's proposed Rule 3035.18 codifies the expectation that the Postal Service will take such action as is necessary to formally initiate pursuit of permanent product status for an experimental product reasonably in advance of bumping up against the \$10 Million Adjusted Limitation annual revenue cap for the experiment. The Commission's proposed rule accommodates the reality that experiments do not necessarily produce actionable results like clockwork or on a pre-

determined schedule, and that there needs to be flexibility in the timing of Postal Service requests for permanent product status. Accordingly, the Commission's proposed Rule 3035.18 does not impose a rigid timeline for the filing of notices seeking review of plans to convert an experimental product to permanent status.

The Postal Service commends the Public Representative for the suggestion at page 15 of its Comments regarding the limited nature of tying the deadline for filing a permanent product status application to the date on which the revenue cap would be exceeded. There will indeed be reasons unrelated to the revenue cap triggering the decision to file for permanent product status and the timing of such filings. However, the Public Representative offers no explanation for why its suggested "more finite" 45-day permanent product notice filing requirement should be preferred over the more flexible standard reflected in the Commission's proposed Rule 3035.18.

#### **VIII. 3035.20 Data Collection And Reporting Requirements**

The Public Representative's suggested re-working of Rule 3035.20 (Comments at 15-16, Appendix A at 10, 11) includes two changes to which the Postal Service objects. The first is the suggestion that the Commission deprive itself of the flexibility to consider permitting the Postal Service to report experiment results on any frequency other than quarterly. The second is the Public Representative's suggestion that the Commission's prescribed deadlines for the filing of quarterly reports never exceed or fall below 40 days from the end of the fiscal quarter to which the report pertains. The Public Representative offers no justification for insisting on such rigidity. The Commission should decline to embrace it.

***IX. Conclusion***

The Postal Service appreciates the opportunity to submit this reply to the Public Representative's Comments and advise the Commission in this rulemaking.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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